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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91176765
Party	Defendant Fortune Fashions Industries, LLC
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Submission	Motion to Dismiss 2.132
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

ROCK OF AGES CORPORATION)	Opposition No. 91176765
)	
OPPOSER,)	
)	
v.)	Mark: ROCK OF AGES
)	
FORTUNE FASHIONS)	
INDUSTRIES, LLC)	
)	
APPLICANT.)	

Trademark Trial and Appeal Board
U.S. Patent and Trademark Office
P.O. Box 1451
Alexandria, VA 22313-1451

**APPLICANT'S MOTION FOR JUDGMENT
UNDER 35 C.F.R. §2.132(a)
FOR OPPOSER'S FAILURE TO PROSECUTE CASE**

Fortune Fashions Industries, LLC ("Applicant") files this motion for judgment against Rock of Ages Corporation ("Opposer") based upon Opposer's failure to prosecute this Opposition proceeding. Opposer failed to submit any testimony during its testimony period and otherwise failed to participate in this case. Accordingly, Applicant respectfully requests that the Board enter judgment by default against Opposer with prejudice.

I. Introduction

Opposer failed to take any testimony or otherwise admit into evidence any proof in support of its opposition during its 30-day testimony period which closed on January 31, 2008. There is no justifiable basis for Opposer's failure to prove its case during its 30-day testimony period. The Board has not suspended the proceeding or otherwise delayed the testimony period.

There is no good or sufficient cause as to why judgment should not be rendered against Opposer. Therefore, Opposition No. 91176765 should be dismissed with prejudice.

II. Applicable Rules and Discussion

Pursuant to 35 C.F.R. §2.132(a):

If the time for taking testimony by any party in the position of plaintiff has expired and that party has not yet taken testimony or offered any other evidence, any party in the position of defendant may, without waiving the right to offer evidence in the event the motion is denied, move for dismissal on the ground of the failure of the plaintiff to prosecute. ... In the absence of a showing of good and sufficient cause, judgment may be rendered against the party in the position of plaintiff.

A defendant may appropriately file a motion for judgment directed to the sufficiency of a plaintiff's trial evidence when the plaintiff's testimony period has passed and the plaintiff has not taken testimony or offered any other evidence. *See* TBMP § 534.01-02. *Detroit Entm't, LLC v. Motor Cities Casinos, LLC*, No. 04-1218, 2004 U.S. App. LEXIS 22580 (Fed. Cir. Oct. 12, 2004); *Mattel, Inc. v. Henson*, No. 03-1360, 2004 U.S. App. LEXIS 1596 (Fed. Cir. Feb. 3, 2004). *See also*, e.g., *Hewlett-Packard Co. v. Olympus Corp.* 931 F.2d 1551 (Fed Cir. 1991) (Federal Circuit affirmed the Board's dismissal of an opposition for failing to present a prima facie case of likelihood of confusion when opposer failed to submit current status and title copies of its registrations); *Procyon Pharmaceuticals Inc. v. Procyon Biopharma, Inc.*, 61 USPQ2d 1542, 1544 (TTAB 2001)(Cancellation petitioner did not take any discovery or testimony.); *S F W Licensing Corp. v. DiPardo Packing Ltd.*, 660 USPQ2d 1372, 1374 (TTAB 2001)(On last day of opposers' testimony period, counsel filed both motion to withdraw and motion to extend).

In this case, Opposer has taken no action whatsoever to prosecute this action during Opposer's testimony period. The Board's most recent scheduling order for this matter shows

that Opposer's testimony period closed on January 31, 2008. Therefore, Opposer has had adequate time in order to prepare its case and offer evidence during its testimony period.

Opposer's only action during this entire case, was to submit a letter to Applicant dated February 8, 2007 (prior to filing the Opposition), proposing a nominal offer of settlement.¹ Any settlement discussions, which ceased long before the close of discovery, did not stay this proceeding in any way. See 37 C.F.R. § 2.117.

In response to Opposer's settlement offer, Applicant provided a counter-offer, but such offer did not suggest or imply that the matter had been settled or would otherwise be stayed pending consideration of the offer. Furthermore, Applicant's counsel inquired as to the status on two occasions (6/25/2007 and 7/5/2007). Then, on July 13, 2007, Applicant's counsel, Kurt Koenig, in an email to Opposer's counsel, noted that unless he heard from Opposer, he would assume that Opposer was not interested in resolving the matter and that any offer would expire on July 20, 2007. On July 13, 2007, in an email, Opposer's Counsel, Adam Resnick, indicated his client was out of the country, but he planned to discuss with his client. No further communication was forthcoming from Opposer's counsel since July 13, 2007. Therefore, there is no basis or reason to suggest that Opposer's settlement offer or Applicant's counter-offer somehow constituted a stay or an agreement between the parties to stay the proceedings as there were no ongoing discussions.

¹ The correspondence regarding settlement is not attached because it is protected pursuant to F.R.E. 408.

Furthermore, Opposer cannot offer the mere existence of settlement negotiations as a basis to argue excusable neglect for its failure to prosecute its case. *See Atlanta-Fulton County Zoo, Inc. v. Depalma*, 45 USPQ2d 1858, 1859 (TTAB 1998).


III. Conclusion

Due to Opposer's failure to prosecute its opposition a judgment in Applicant's favor is appropriate pursuant to 37 C.F.R. §2.132(a).

FORTUNE FASHIONS INDUSTRIES, LLC

Dated: February 22, 2008

By: _____


Kurt Koenig

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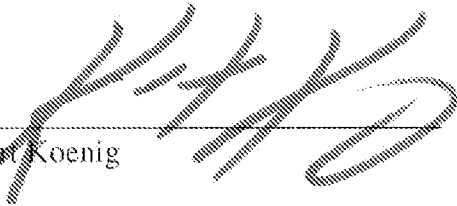
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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that this correspondence is being transmitted by electronic mail to the United States Patent and Trademark Office via ESTTA on the date identified below.


Kurt Koenig

Dated: February 22, 2008

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing "APPLICANT'S MOTION FOR JUDGMENT UNDER 35 C.F.R. §2.132(a) FOR OPPOSER'S FAILURE TO PROSECUTE CASE" was served on February 22, 2008 by first-class mail, postage prepaid, to Opposer's counsel addressed as follows:

Mr. Adam D. Resnick
Arent Fox LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036


Kurt Koenig

Dated: February 22, 2008
